84-1488 (3)

No. 84-1480

Office - Supreme Court, U.S.
FILED
APR 24 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BALDWIN-UNITED CORPORATION
AND D.H. BALWIN COMPANY,
Petitioners,

v.

ROBERT M. EUBANKS, III, INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas

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BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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FOR THE STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas

---

BRIEF IN OPPOSITION

Robert M. Eubanks, III, Insurance Commissioner for the State of Arkansas hereby files this his Brief in Opposition to the Petition for Writ of Certiorari filed by Baldwin-United Corporation and D.H. Baldwin Company.[1]

STATEMENT

A. Brief Summary of Respondent's Position.

Respondent does not agree with Petitioners' version of the issues presented by this case. In outline, Respondent's position is as follows:

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[1] Respondent's parent companies, subsidiaries and affiliates are listed in the Appendix to this Brief pursuant to Rule 28.1.

1. This case does not present a vital federal question and is not a proper case for the granting of certiorari.

2. The settlement between the parties does not render this case moot because the settlement is tentative and this Court should not dismiss for mootness.

3. Assuming, arguendo, that the case is moot by reason of the settlement, this Court should simply dismiss the petition and should not vacate the Arkansas Supreme Court opinion.

4. If this Court determines the petition should be granted, then the decision of the Arkansas Supreme Court should be sustained because it correctly applies the law.

B. The Nature of the Case.

Petitioners attempt to characterize this case as an unsanctioned intrusion by a state court into the area of Federal Bankruptcy. That is not the fact.

While it may be true that this matter involves the largest bankruptcy in history, it is equally true that it also involves the largest insurance insolvency proceedings in history.

In July, 1983 state courts in Arkansas and Indiana placed six insurance companies into Rehabilitation pursuant to state statutes. Petitioners consented to this action.[2] The property rights of over 300,000 policyholders are at stake, and in many instances the life-savings of retirement-aged people are involved.

The rehabilitation and liquidation of insurance companies has long been left to the states, pursuant to state statutes, under the auspices of state courts.

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[2] See Appendix C to Petitioners' Appendix. In this regard this Court should note Petitioners consented to the entry of the injunction issued on July 13, 1984 by the Rehabilitation Court.

The instant application arises out of the Arkansas Rehabilitation proceedings. Respondent and his predecessor in office have acted expeditiously and in strict compliance with the applicable state statutes (Ark. Stat. Ann. 66-4800, et seq., Appendix A). From January 9 to January 14, 1984 the Circuit Court of Pulaski County, Arkansas (the "Rehabilitation Court") held a full and free evidentiary hearing. Petitioners fully participated in the hearing.

On March 23, 1984 the Rehabilitation Court entered its Order Adopting Plan of Rehabilitation and, inter alia, found that certain assets were the property of the insurance companies and reasserted exclusive, continuing jurisdiction over those assets. The Rehabilitation Court's Order also enjoined all parties and other persons and entities from asserting claims to those assets other than in the Rehabilitation Court unless such party first obtained the permission of the Rehabilitation Court to do so. The issuance of such an injunction is expressly authorized by Ark. Stat. Ann. 66-4804. In Respondent's view these circumstances do not present any intrusion into the area of federal bankruptcy and do not present a vital federal question. Assuming the efficacy of the Rehabilitation Court's fact finding that the assets in question are the property of the insurance companies,[3] then there is not a vital federal question presented.

Under the applicable law (discussed in detail below) the two separate systems, state insurance insolvency and federal bankruptcy, do not conflict in this case. A hearing has been held which resulted in a finding that a certain res belonged to the insurance companies and the Rehabilitation Court asserted in rem jurisdiction over that res. That Court then protected its jurisdiction by an injunction.

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[3] As discussed below, the Petitioners, having participated in the hearing, are bound by this fact finding.

Petitioners have already had their day in court as to the issue of whether the res belongs to the insurance companies. That being the case, it would be improper to allow them to litigate the issue again, whether in bankruptcy court, in federal district court or in another state court. These circumstances do not raise a federal question worthy of the attention of this Court.

Respondent concedes that the Bankruptcy Court has jurisdiction over certain assets, the title to which is in Petitioners. It is equally true, however, that the Rehabilitation Court has jurisdiction over certain assets, title to which is in the insurance companies.

Claims against assets in the hands of the Rehabilitation Court should be pursued in the Rehabilitation Court. An injunction which requires claims to be pursued in such fashion does not conflict with relevant law and does not intrude upon the jurisdiction of the bankruptcy court.

C. This Case Is Not Necessarily Moot.

The settlement is a tentative settlement conditioned upon the occurrence of several future conditions which may or may not be satisfied. As a matter of fact, the settlement is presently subject to cancellation because a tax allocation agreement which the parties were required to agree upon by February 21, 1985 has not yet been agreed upon. Respondent hopes that it will yet be agreed upon and that the several other conditions to the binding effect of the settlement will be met, but there is no certainty that this will occur. Under such circumstances this matter is not necessarily moot. Further, the Rehabilitation Plan and the Opinion of the Arkansas Supreme Court upholding the Plan involve public issues. The vital public interest of the State of Arkansas, as well as the vital rights of hundreds of thousands of policyholders and others will be affected by this case. Accordingly, the Petitioners are not the only ones with an interest in this matter.

D. Even if the Case Is Moot, This Court Should Not Vacate the Arkansas Supreme Court Opinion.

Vacating the opinion would cast doubt upon the application of the Plan, including the injunction provisions, to many other situations and the rights of many other interested persons and entities. Such a result should not follow because Respondent and Petitioners have entered into a tentative settlement agreement.

E. The Opinion Below Is Proper in any Event.

The Arkansas Supreme Court's opinion is sound and does not threaten to undermine the bankruptcy system. The Arkansas Supreme Court has very cogently set out the basis for its ruling in its opinion. As to the primary challenge made by Petitioners, the Arkansas Court reasons in substance that:

> (1) Under the McCarran-Ferguson Act no act of Congress shall "invalidate, impair or supersede any law enacted by any state for the business of insurance."
>
> (2) The Arkansas comprehensive statautory scheme for dealing with impaired insurance companies expressly authorizes the issuance of injunctions in connection with insolvency proceedings and was enacted for the business of insurance.
>
> (3) It therefore logically follows that the Bankruptcy Code, which is an act of Congress, cannot invalidate, impair or supersede the Arkansas statutory scheme, including the injunction provisions.

Additional support for this logic comes from the Bankruptcy Code's exclusion of insurance companies under 11 U.S.C. 109(b) and (d).

The Court also found that the injunction issued does not exceed the Rehabilitation Court's statutory authority and that Petitioners did not contend it did.

If a state court having jurisdiction of a res pursuant to a state insurance insolvency proceeding cannot protect that res from the inevitable erosion which would result from multiplicitious litigation in distant jurisdictions, then the states will be rendered powerless to deal with such insolvencies in any meaningful way. If the states are not able to deal with them, they will not be dealt with because insurance companies cannot be debtors under the bankruptcy laws.

This case does not represent the danger to the federal bankruptcy system that Petitioners suggest it does. The actual danger presented by this case is that if Petitioners' position is adopted by this Court, the insurance insolvency systems of the various states will suffer a crippling and, probably fatal, blow.

Another distinct point to be made in support of the opinion below is that there is a res adjudicata or collateral estoppel effect from the Rehabilitation Court's fact finding that the res in question is the property of the insurance companies. Even if this Court were totally to accept Petitioners' view of the law, it is still necessary that there be a triable fact issue for the Bankruptcy Court even if that Court otherwise has the requisite jurisdiction. Given the finding already made by the Rehabilitation Court, which is now a final judgment, there is nothing for the Bankruptcy Court to try as to ownership of the assets.

ARGUMENT AND AUTHORITIES

I. THE WRIT SHOULD NOT BE GRANTED.

This Court has no doubt noted that Petitioners assert that they have been enjoined from pursuing claims "to property that *may* be part of the bankruptcy estates." In view of the fact findings by the Rehabilitation Court, the injunction goes to specific assets which a court of competent jurisdiction has already found *are* the property of

the insurance companies. That being the case, there is no basis upon which to believe they *may* be part of the bankruptcy estates. Petitioners should not be given multiple opportunities to litigate the same issue. The Rehabilitation Court's fact finding is no longer reviewable; *Evco v. Franklin Jones*, 409 U.S. 91 (1972); and it is entitled to full faith and credit. *Pennoyer v. Neff*, 95 U.S. 714 (1878); 12 U.S.C.A. 1738; *Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691 (1982).

Petitioners' characterization of the Arkansas Court's opinion as "extraordinary" and "parochial" not only does injustice to a succinct and well-reasoned opinion, but it attempts to obscure the real issues of the case. The court's opinion was correct. See detailed discussion at p. 10, et seq., infra.

In this connection it is interesting to note that on page 19 of Petitioners' application they make much of the Congress' 1984 designation of fraudulent transfer and preference claims as "core" bankruptcy matters. Whether these are core proceedings in the context of the Bankruptcy Code or not is irrelevant to the Respondent's position and to the basis for the Arkansas Supreme Court's opinion. Petitioners fail to mention the mandatory abstention provisions of 28 U.S.C.A. § 1334(c)(2) which would seem to support Respondent's position. Even though the effective date of these provisions probably renders them inapplicable to the current case, they do show that Congress does not support the dragnet approach of Petitioners even with respect to "core" proceedings. See also *In Re Dakota Grain Systems, Inc.*, 41 B.R. 749 (Bankr. D N.D. 1984).

In this regard, the same observation can be made concerning the mandatory provisions of 28 U.S.C.A. § 157(d) which require the district court to withdraw cases from the bankruptcy court which require consideration of both Title 11 and other laws of the United States regulating

organizations or activities affecting interstate commerce. Again, this provision may not apply specifically to this case, but it does show a congressional unwillingness to allow bankruptcy courts to deal with every issue which can arise in a bankruptcy context.

It is also fair to say that *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) militates against Petitioners' position. Arkansas has preference and fraudulent transfer statutes of its own and does not need to resort to the bankruptcy laws in that regard. Further, these federal statutes could be applied in the state court. Any fraudulent transfer claim with respect to the assets held by the insurance companies not only could have been brought in state court, independent of any bankruptcy proceedings, but they still could be. Further, *Northern Pipeline* places severe limitations on the power of Article I bankruptcy judges to hear traditional Article III matters. It is doubtful that 28 U.S.C.A. 157 has remedied the problem.[4] In any event, insurance insolvency matters should not be left to the jurisdiction of Article I judges when Congress and this Court have stated such matters are within the province of the States.

The injunction issued by the Rehabilitation Court is not absolute. It provides Petitioners an opportunity to seek relief from its provisions by requesting such relief from the Rehabilitation Court. That Court's Order also allows Petitioners to file whatever claims they wish to file in the Rehabilitation Court.

Under these circumstances and in view of the discussion below the writ should not be granted.

II. THIS CASE IS NOT MOOT.

The settlement between the parties is subject to several conditions, at least one of which has already failed, and

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[4] For example, a recent bankruptcy court decision has held 28 U.S.C.A. 157(b)(2)(f) to be unconstitutional. *In the Matter of Associated Grocers of Nebraska Cooperative, Inc.*, 46 Bankr. 173 (B.C., D.C. Neb., 1985).

is therefore a tentative settlement. This Court has held that a tentative settlement agreement does not render a matter moot. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465, n. 3 (1978).

While Respondents hope that this tentative settlement will ultimately be consummated, there is no certainty that will happen. Under these conditions, the case should not be considered moot.

This Court should also give weight to the fact that Petitioners are not the only parties who have an interest in the opinion of the Arkansas Court. The opinion is important to the rights of hundreds of thousands of other interested persons and entities. That being the case, the Court would have a sound rationale for finding the case is not moot, especially in view of the tentative nature of the settlement.

The Court may also wish to consider the public interest in a resolution of the issues presented, and determine that in certain cases the public interest is so vital, the persons whose rights may be affected are so numerous, and the likelihood of repetition so great, that the matter is not moot. *I.e., Americana Health Care Corp. v. Schweiker*, 688 F.2d 1072, 1976 n. 10 (7th Cir. 1982), cert. den., 459 U.S. 1202; *In re National Broadcasting Co.*, 635 F.2d 945, 949 n. 1 (2nd Cir. 1980); *Matter of Carlson*, 580 F.2d 1365, 1372-1373 (10th Cir. 1978); *Trachtman v. Anker*, 563 F.2d 512, 514 n.1 (2nd Cir. 1977), cert. den., 455 U.S. 925; *Jones v. Illinois Dept. of Rehabilitation Services*, 689 F.2d 724, 727-728 (7th Cir. 1982).

This controversy is almost certainly going to recur, if not with respect to others interested in the instant rehabilitation proceedings, then in connection with other rehabilitation proceedings, and it surely involves the vital public interest. No purpose would be served in promoting repetitious litigation over the issues raised with respect to the ability of the states to administer rehabilitation and other insurance insolvency matters. *DeFunis v.*

Odegaard, 416 U.S. 312 (1974) (dissent and authority cited therein).

III. EVEN IF THE CASE IS MOOT THIS COURT SHOULD DISMISS THE APPLICATION AND SHOULD NOT VACATE THE ARKANSAS SUPREME COURT OPINION.

Vacating the Arkansas Opinion would cast doubt upon the Rehabilitation Plan and introduce needless confusion into a process which is now proceeding quite well in the state courts.

Vacation of the decision of the Arkansas Supreme Court could rob that decision of its precedential value. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). In the instant case, the precedent set by the Arkansas Supreme Court is of extreme importance. The crediting rate issue determined by the Arkansas Court and that Court's general affirmance of the Plan of Rehabilitation bring certainty to what was a chaotic situation. If doubt is now cast upon the Arkansas Opinion chaos could return.

This Court has avoided the destruction of the stare decisis effect of state court opinions in the past by simply dismissing petitions for writ of certiorari. *District Attorney v. Sacramento City Civil Serv. Commission*, 449 U.S. 811 (1980); *Logan v. Strickland*, 440 U.S. 902 (1979). Should the Court determine the case to be moot, Respondent urges the Court to adopt this approach and preserve the stare decisis value of the Arkansas Opinion.

IV. IF THIS COURT DETERMINES THE PETITION SHOULD BE GRANTED, THEN THE DECISION OF THE ARKANSAS SUPREME COURT SHOULD BE SUSTAINED BECAUSE IT CORRECTLY APPLIES THE LAW.

Petitioner wrongly attempts to couch this case in Supremacy Clause terms and present it as some form of assault by the State of Arkansas upon the federal system in general and the bankruptcy system in particular.

Neither Respondent nor the Arkansas Supreme Court deny the power of Congress to create and maintain a uniform system of bankruptcy. Neither deny the Supremacy Clause. In fact, both rely upon the clear language of federal law and the clear result that law mandates.

A. Jurisdiction Over Insurance Company Insolvency Proceedings Lies With the States and Not With the Bankruptcy Courts.

The operation of the McCarran-Ferguson Act, 15 U.S.C. 1011, et seq., and the provisions of the Bankruptcy Code, 11 U.S.C. 109 mandate the result reached by the Arkansas Supreme Court.

> [these] businesses require public supervision and control because they deal with people who are at an economic disadvantage, vis a vis these enterprises. In the case of insurance companies, most states have enacted regulatory schemes which include provisions for insolvency. Since these schemes are designed to protect the interests of policyholders and to provide for the adjustment of the rights of creditors and policyholders in the event of insolvency . . . Congress . . . decided that liquidation of insurance companies should be left to the states. . . . By preserving state liquidation proceedings, Congress sought to prevent bankruptcy or reorganization counts from interfering with comprehensive state insurance regulations and with the rights of insureds protected by such regulations. *In Re Equity Funding Corporation of America*, 396 F.Supp. 1266, 1275 (C.D. Cal. 1975).

See also Sims v. Fidelity Assur. Ass'n., 129 F.2d 442 (4th Cir. 1942); *In re Supreme Lodge of the Masons Annuity*, 286 F. 180 (N.D. Ga. 1923); *Woolsey v. Security Trust Co.*, 74 F.2d 334 (5th Cir. 1935) (state bank).

In pertinent part, Section 2 of the McCarran-Ferguson Act provides:

> a) The business of insurance and every person engaged therein, shall be subject to the laws of the

> several states which relate to the *regulation* or taxation of such business.
>
> b) *No* Act of Congress shall be construed to *invalidate, impair* or *supersede any law* enacted by *any State for the business of insurance,* or which imposes a fee or tax upon such business, unless such Act specifically relate to the business of insurance: [There follow several exceptions not relevant here]. (Emphasis added)

It is impossible to deny that the Bankruptcy Act is an act of Congress and it is eminently clear that the Bankruptcy Act does not relate to the business of insurance because the act itself excludes insurance companies.

In *Prudential Insurance Co. v. Benjamin, Insurance Commissioner,* 328 U.S. 408 (1946) this Court held that one of Congress' purposes in the act was to "declare expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject' to the laws of the several states in these respects."

In *Group Life and Health Insurance Company v. Royal Drug Company,* 440 U.S. 205 (1979). This Court said McCarran-Ferguson makes the states supreme with respect to laws regulating the business of insurance. In that case this Court also held that the relationship between the insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement were the core of the 'business of insurance'.

The instant Rehabilitation Plan and proceedings are part of the regulation of these "core" aspects of the business of insurance.[5]

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[5] Petitioners cite these two cases for the proposition that the Rehabilitation process is not the business of insurance. There is no support for them here. While it may be that an insurance company's contract with a pharmacy or its plumber may not be the business of insurance, its contract with its policy holders certainly is.

Even prior to McCarran-Ferguson, federal courts were not permitted to interfere with state insurance insolvency proceedings. *Motlow v. Southern Holding and Securities Corp.*, 95 F.2d 721 (8th Cir., 1938); *Jacoby v. Bond & Mortgage Guaranty Co.*, 72 F.2d 420 (2d Cir. 1934), cert. den., 273 U.S. 619 (1934).

Insurance rehabilitation attempts to maintain operation of the insurance companies to maximize return to policyholders and creditors and is a key element of the state's regulation of the insurance business. The Arkansas Supreme Court, which is the final interpreter of Arkansas law,[6] specifically held that the rehabilitation of these three insurance companies is of vital state concern and that Ark. Stat. Ann. 66-4804, which authorizes the injunction in issue, is a law enacted for the business of insurance.

Unless McCarran-Ferguson and the Bankruptcy Act do not mean what they plainly say, and unless the Arkansas Supreme Court does not recognize an Arkansas law "enacted for the business of insurance" when it sees one; the Arkansas Court's analysis, in all good sense, should resolve this case. There is no conflict between Arkansas and the federal system because the Arkansas Supreme Court's Opinion is totally consistent with federal law.

B. The Arkansas Injunction Does Not Violate the Relationship Between State and Federal Courts.

The instant case is not a Supremacy Clause case. The courts below have not acted in contravention of the federal scheme for insurance insolvency juridiction. Rather, the Arkansas Court has done nothing more than faithfully apply existing federal law to Arkansas statutes.

At a minimum, an insurance insolvency court must have the power to protect its *in rem* and *quasi in rem* jurisdiction over the assets of the insurance companies

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[6] *Brown v. Ohio*, 432 U.S. 161, 167 (1977), *Garner v. Louisiana*, 368 U.S. 157, 169 (1961).

which are the res it is the Court's duty to deal with.[7] *Matter of Bankers Trust Company*, 556 F.2d 1281 (5th Cir. 1978).

> In this case, the state court restrained Moody from, and assessed damages for, his action which did and would interfere with the receivership proceeding. It cannot be disputed is one *in rem* or *quasi in rem*. The [federal case in which Moody joined], had it succeeded, would have impeded, if not thwarted, the entire receivership proceeding. Moody's conduct in the [federal] case attacked the very validity of the receivership, jurisdiction over which, under *Donovan*, rested safely and exclusively in the Alabama State court.[8] *Sumrall v. Moody*, 620 F.2d 548, 550 (5th Cir. 1980).

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[7] In *Underwriters' National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691, 696 n.2 (1982), this court noted, with criticism, that several pending state and federal actions had been stayed pursuant to an injunction issued by the Rehabilitation Court in that case. That injunction was very similar to the one issued in the instant case.

[8] For an example of the nightmare of litigation which could occur if an insurance insolvency court is not able to protect its jurisdiction, and the type of antics a determined shareholder can resort to; see the Moody cases: e.g.: *Sumrall v. Moody, supra*; *Moody v. Alabama ex rel. Payne*, 355 So.2d 1116 (Ala. 1978), cert. den. 439 U.S. 910 (1978); *Ex parte Shearn Moody*, 351 So.2d 538 (Ala. 1977), cert. den. 435 U.S. 969 (1978); *Moody v. Alabama ex rel. Payne*, 351 So.2d 552 (Ala. 1977), cert. den. 435 U.S. 969 (1978); *Moody v. Texas*, 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.), cert. den. 434 U.S. 985 (1977); *Ex parte Shearn Moody*, cert. den. 434 U.S. 835, reh. den. 434 U.S. 976 (1977); *Moody v. Moody Nat'l. Bank*, 522 S.W.2d 710 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd, n.r.e.); *Moody v. Crook*, 520 S.W.2d 958 (Tex. Civ. App.—Austin 1975, no writ). *Ex parte Moody*, 418 So.2d 93 (1982), cert. den. 459 U.S. 1226; *Moody v. State*, 539 S.W.2d 354 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) cert. den. 434 U.S. 985 (1978); *Moody v. State*, 520 S.W.2d 452 (Tex. App.—Austin 1975, writ ref'd n.r.e.); *Moody v. Jones*, 519 S.W.2d 536 (Tex. Civ. App.—Austin 1975, no writ); *Empire Life Ins. Co. v. Moody*, 584 S.W.2d 855 (Tex. Sup. 1979).

The injunction protects the assets of the insurance companies for the benefit of all policyholders and creditors. "The assets would not be protected nor claims paid equitably if the liquidator were forced to defend lawsuits brought after the liquidation decree was entered:" *Janak v. Allstate Ins. Co.*, 319 F.Supp. 215 (1970).

Petitioners argue that the claims in question are *in personam* and that their resolution by the bankruptcy court is in no way tantamount to reorganizing the insurance companies and would not inhibit the state rehabilitation process. This is not true. If the Bankruptcy Court now decides to somehow reverse the finding already made by the Rehabilitation Court as to ownership of the assets and then order the Rehabilitation Court to turn the assets over (or order the Rehabilitator/Receiver to do so in contravention of an order of the court which appointed him), this would clearly inhibit the Rehabilitation process.

Petitioners' argument that this result would operate in personam and not in rem is based upon *Massie v. Watts*, 10 U.S. (6 Cranch) (1810); *Sax v. Sax*, 295 F.2d 133 (5th Cir., 1961) and *Mandley v. Backer*, 121 F.2d 875 (D.C. Cir., 1941). Petitioners also relied upon *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Ins. Co.*, 600 F.2d 671 when they briefed this issue in the Arkansas Supreme Court, but they no longer cite it for that purpose. The probable reason for their abandonment is that a sequel to *Central States* has cut the ground out from under this approach. *Old Security Life Ins. Co. v. Continental Illinois National Bank*, 740 F.2d 1384 (7th Cir. 1984).

While *Central States* seemingly lent some support to Petitioners' argument, *Old Security* held that the state insolvency court could not be ordered to pay an in personam judgment even if one were obtained. Thus, Petitioners' rationale would lead them through a long and tedious process of litigation which might result in a judgment in their favor or which might not. If they did

succeed in obtaining a judgment they would then be required to confront the same Rehabilitation Court Order they now confront. If this is the road Petitioners wish to travel, the destination hardly seems worth the trip. Furthermore, such a process would be an egregious waste of the assets of both the bankruptcy estates and the insurance estates and would involve needless litigation which this Court should not encourage or sanction.

When all is said and done, the state court has control of the res, and no other court can require it to surrender that control. It has been held that protection of the *in rem* and *quasi in rem* jurisdiction of the state insurance insolvency court may require restraint of actions which interfere with the insurance insolvency proceeding. *Sumrall v. Moody, supra.*

Petitioners argue strenuously that the preferential transfer and fraudulent conveyance claims are *in personam* and that this necessarily means that such claims do not interfere with the *in rem* jurisdiction of the state insolvency court. This reasoning is unsound.[9] Moreover, this argument does not consider the policy behind the *in rem/in personam* distinction in the insolvency context. *In rem* jurisdiction allows the insolvency court to protect its jurisdiction over the *res* by an appropriate injunction. The Second Circuit has recognized that an action which is ostensibly *in personam* may become one which threatens the *res* when its purpose is to disrupt the *in rem* proceeding. *Brooklyn Trust Co. v. Kelby*, 134 F.2d 105 (2d Cir. 1943), *cert. den.* 319 U.S. 767 (1945). As that court noted:

> Appellant seems to argue that the action against Manhattan . . . is not *quasi in rem* because it does not relate to a *res*, on the ground that it merely seeks a money decree "in personam" against Manhattan as

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[9] This unsoundness is discussed, *supra*, but it is also unsound because the current confused state of the bankruptcy laws would only introduce an additional layer of time-consuming uncertainty to the rehabilitation process.

> trustee, and that a "right" which is "in personam" cannot be a "res". That is a mistaken notion, based upon a play upon the unfortunate vagueness of the Latin word "res", a vagueness which would be more apparent if the word were Englished (or Americanized) and called a "thing". But no matter how inadequate "res" may be as a descriptive label, it is not true that a money claim *in personam* cannot be a "res".

Regardless of the many ways in which the situation can be viewed, the simple fact is that the Rehabilitation Court has jurisdiction of the assets of the insurance companies, it has implemented a detailed and comprehensive Rehabilitation Plan and the Plan is proceeding quite well. The Rehabilitation Court should be left to do its job in an organized, sensible manner without interference from other courts.

C. The Arkansas Supreme Court Did Not Err in Finding Authority for the Injunction in Section 109 of the Bankruptcy Code and the McCarran-Ferguson Act.

Petitioners have asserted that the amount of their claims *may* reach into the hundreds of millions of dollars.[10] Moreover, if Petitioners' petitions were sustained and they were allowed to pursue their claims against the insurance companies in a distant forum so could others. A nightmare of litigation could ensue, with hundreds of thousands of suits being brought by policyholders or creditors in all fifty states. Obviously, if Petitioners may proceed as to the res in this bankruptcy court, then others could proceed

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[10] Respondent points out again that these "claims" are mere will-o-the-wisps in this case. They are only "maybes" and there is nothing in the record with respect to their real nature or their merits. Respondent would further point out, however, that these "claims" are "downstream" preference and fraudulent transfer claims which have little merit. See, Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U. Pa. L. Rev. 235, 238; *In Re Royal Crown Bottlers of North Alabama*, 23 B.R. 28 (N.D. Alabama, 1982).

in their bankruptcy courts in other related cases. The Rehabilitation Court, acting pursuant to an unchallenged state statute, Ark. Stat. Ann. 66-4804, enjoined this possibility and it was right and proper to do so.

The rehabilitation of the insurance companies by Respondent and his Indiana counterpart is a very significant and complex matter. Under 11 U.S.C. 109, no federal bankruptcy court can accord the insurance companies insolvency relief. This role is left to the states. The issue correctly resolved by the courts below is the extent to which a state court may act to protect its insurance insolvency jurisdiction.

Only a state court may take *in rem* jurisdiction over an insurance insolvency proceeding. Although it is generally held that a state court may not enjoin federal proceedings, "[a]n exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed". *Donovan v. City of Dallas*, 377 U.S. 408 (1964). In the instant case the courts below have acted to protect the *in rem* jurisdiction of the Rehabilitation Court. This has required the injunction of the prosecution of all actions against the insurance companies in forums other than the Rehabilitation Court.

The purpose of according deference to a court with *in rem* jurisdiction is the prevention of dissipation of the *res*. In a case the size of the instant case, failure to issue such an injunction could mean the piecemeal dissipation of the *res* in foreign jurisdictions, minimizing return to policyholders and creditors. Such a result would happen in any similar case and could well dissipate all the assets of a particular estate with the result that a rehabilitation which could have been possible could be rendered impossible. Surely Congress did not exempt insurance companies from debtor status in bankruptcy in order to make them less able to be effectively rehabilitated or

liquidated than non-regulated entities. Instead, the exemptions from federal regulation contained in 11 U.S.C. 109 and 15 U.S.C. 1011 et seq. for insurance companies were intended to enhance the effectiveness of state regulation of the insurance companies. The Arkansas courts have acted to ensure that an effective rehabilitation is possible through an injunction which conserves the *res* against a palpable threat of dissipation through litigation in distant venues. This action should not be overturned.

In *Matter of Banker's Trust*, 566 F.2d 1281, 1286 (5th Cir. 1978) the Fifth Circuit determined that federal courts should not determine priorities among creditors of a savings and loan. Like insurance companies, savings and loans may not become debtors in bankruptcy. 11 U.S.C. 109, former 11 U.S.C. 22 (superseded). As the court in *Banker's Trust* noted:

> If any meaning is to be given to congressional exclusion of savings and loan associations from the Act, it must be that determination of the rights of a savings and loan institution's creditors, a core function of bankruptcy, must be left to state governments.

In precisely the same vein, the Arkansas Supreme Court held "If any meaning is to be given to the congressional exclusion of insurance companies from the bankruptcy act and the mandate of the McCarran-Ferguson act, it must be that the determination of rights among an insurance company's creditors must be left to state preceedings." This holding is eminently correct. No other conclusion can be rendered when the bankruptcy act provisions and the McCarren-Ferguson act provisions are read side by side with the Arkansas rehabilitation statutes.

Insurance companies have long been exempt from Bankruptcy Law. In *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920) this Court stated:

> The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations,

> and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of 'municipal, railroad, insurance or banking' corporations to their creditors and their creditors to them, to other provisions of the law."

Petitioners' position seems to be that an insurance insolvency court should have no right to protect its *res*. However, Petitioners' position ignores the fact that *in rem* insolvency proceedings involving traditionally state regulated entities have consistently exercised that power.

Contrary to Petitioners' assurance that the Arkansas Supreme Court has erred, the Arkansas Court has rendered a coherent, well-reasoned and sensible opinion. Perhaps the core of that opinion as it relates to this application is found in the following:

> We do not hold that the McCarran-Ferguson Act prohibits a person from making a claim in bankruptcy against an insurance company under any circumstances. In this instance, however, an insurance company is being rehabilitated pursuant to a state statutory scheme, and the rehabilitation court found it necessary to enjoin other proceedings in order to secure an orderly rehabilitation. Therefore, the McCarran-Ferguson act prevents the bankruptcy act from being used to invalidate or impair the Arkansas Statutes. The appellants do not have an absolute right to pursue their claim in bankruptcy court.
>
> The rehabilitation of these three insurance companies is of vital state concern.

Given the applicable law and the circumstances presented, this Court should not disturb the comprehensive plan implemented by the Circuit Court and sustained by the Arkansas Supreme Court.

The Arkansas Supreme Court acted in a manner prudent and necessary to preservation of the res. Its decision that "the federal courts may not take action to remove the estate, or any part of it, from the state court's juris-

diction or to subject the same to the federal court's jurisdiction" is certainly not a novel theory. *Leggett v. Green*, 188 F.2d 817, 819 (8th Cir. 1951). *See also, Holley v. General American Life Ins. Co.*, 101 F.2d 172 (8th Cir. 1939). In *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936) this Court upheld an injunction issued by a state court to protect its jurisdiction over an insolvent insurance company res.

The Arkansas Supreme Court correctly interpreted the effect under state law of the bankruptcy exemption for insurance companies. Even if, as Petitioners contend, 28 U.S.C. 1334(d) is in conflict with that policy, then 28 U.S.C. 1334(d) and 11 U.S.C. 109(b) are the conflicting provisions. To reconcile these provisions, analysis of the policy behind the insurance company exemption is necessary. An analogous case is *Matter of Gary Aircraft Corp.*, 698 F.2d 775 (5th Cir. 1983). In that case the jurisdiction conflict was between the bankruptcy court and the Armed Services Board of Contract Appeals. Faced with conflicting claims of exclusive jurisdiction, the Fifth Circuit determined that the Armed Services Board of Contract Appeals' jurisdiction should prevail, due to the specialized knowledge which the Board had of the intricate considerations involved.

Similarly, the State of Arkansas has enacted a comprehensive rehabilitation statutory scheme. Ark. Stat. Ann. 66-4800 et seq. This system provides an orderly scheme for insurance insolvencies which contemplates and addresses the substantial differences between insurance insolvencies and ordinary insolvencies. If, indeed, there is a conflict among federal statutes relating to insolvent insurance companies—which Respondent denies—that conflict should be resolved in favor of the clear and long-standing federal policy towards state regulation of insurance companies.

CONCLUSION

The Arkansas Supreme Court was correct in its opinion. Certiorari should be denied or the petition should be dismissed without vacating the judgment below. If the Petition is granted then Respondent should prevail.

Respectfully submitted,

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APPENDICES

APPENDIX A

ADDITIONAL STATUTES INVOLVED

Ark. Stat. Ann. 66-4802. *Jurisdiction of delinquency proceedings—Venue—Change of venue—Exclusiveness of remedy—Appeal.*

* * * *

(1) Delinquency proceedings pursuant to this chapter shall constitute the sole and exclusive method of liquidating, rehabilitating, reorganizing or conserving an insurer, and no court shall entertain a petition for the commencement of such proceedings unless the same has been filed in the name of the State on the relation of the Commissioner.

(2) An appeal shall lie to the supreme court from an order granting or refusing rehabilitation, liquidation, or conservation, and from every order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein. (Acts 1959, No. 148, § 639.)

Art. Stat. Ann. 66-4803. *Commencement of delinquency proceedings.*

The Commissioner shall commence any such proceedings by application to the court for an order directing the insurer to show cause why the Commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of the policyholders, creditors, stockholders, members, subscribers or the public may require. (Acts 1959, No. 148, § 640.)

* * * *

66-4804. *Injunctions.*

(1) Upon application by the Commissioner for such a order to show cause, or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

(2) The court may at any time during a proceeding under this chapter issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgment, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.

* * * *

Ark. Stat. Ann. 66-4810. *Order of rehabilitation—Termination.*

(1) An order to rehabilitate a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.

(2) If at any time the Commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.

(3) The Commissioner, or any interested person upon due notice to the Commissioner, at any time may apply to the court for an order terminating the rehabilitation proceedings and permitting the insurer to resume possession of its property and the conduct of its business, but no such order shall be made or entered except when, after a hearing, the court has determined that the purposes of the proceedings have been fully accomplished. (Acts 1959, No. 148, § 647.)

APPENDIX B

RESPONDENT'S PARENT COMPANIES, SUBSIDIARIES (EXCEPT WHOLLY OWNED SUBSIDIARIES), AND AFFILIATES PURSUANT TO SUPREME COURT RULE 28.1

Allcity Insurance Company
Baldwin Holding Company
Baldwin-United Corporation
Balunit, Inc.
Barbados Light and Power Co., Ltd.
Brookwood Apts., Ltd.
Canadian International Power Company Liquidating Trust
Chevy Chase Associates
Compagnia Boliviana de Energia Electrica, S.A.—Bolivian Power Company Limited
Compagnia de Alumbrudo Electrico de San Salvador
D. H. Baldwin Company
Empresa de Luz y Fuerta Electrica de Oruro
Farmers and Ranchers Life Insurance Company
Kendale Lakes Mall
Lake Sherwood Joint Venture
MAC Development Corporation of Florida, Inc.
Mortgage Guaranty Insurance Corp.
Mutual Management, Inc.
Northmoor-South Apts., Ltd.
Oakhurst Square, Ltd.
Oakhurst Square II, Ltd.
S&H Group, Inc.
The Sperry and Hutchinson Company
S&H Motivation & Travel, Inc.
S&H Investments, Inc.